

## **REMARKS**

### **I. Introduction**

Applicant respectfully requests reconsideration of the present application in view of the foregoing amendments and in view of the reasons that follow.

Claims 2 and 7 are requested to be canceled. The cancellation of claims does not constitute acquiescence in the propriety of any rejection set forth by the Examiner.

Claims 1, 3, 5-6, 8, 10-11, and 14 are currently amended.

This amendment adds, changes and/or deletes claims in this application. A detailed listing of all claims that are, or were, in the application, irrespective of whether the claims remain under examination in the application, is presented, with an appropriate defined status identifier.

Upon entry of this Amendment, claims 1, 3-6, and 8-19 will remain pending in the application.

Because the foregoing amendments do not introduce new matter, entry thereof by the Examiner is respectfully requested.

### **II. Response to Issues Raised by Examiner in Outstanding Office Action**

#### **a. Claim Rejections - 3 U.S.C. § 112, Second Paragraph**

Claims 14-19 remain rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point and distinctly claim the subject matter, which applicant regard as their invention. The Office asserts that the term "about" is a relative term that renders claims 14-19 indefinite. See Office Action dated April 27, 2005, pp. 3-4. While Applicant respectfully disagrees with these grounds for rejection, claim 14 has been amended to delete the terms "about." Applicant respectfully requests reconsideration and withdrawal of the rejection.

**b. Claim Rejections - 35 U.S.C. § 102**

Claim 1 is rejected under 35 U.S.C. § 102(b) as being anticipated by Bell et al. (WO 97/38593; 1997). Applicants have amended claim 1 to include linoleic acid, α-linoleic acid, and eicosapentaen acid and/or docosahexaen acid, among other limitations. As the Office has conceded that Bell does not teach these elements Applicant believes Bell can not serve as the basis for a § 102 rejection. See Office Action, dated April 27, 2005, p. 9 and see MPEP § 2131. Applicant respectfully requests reconsideration and withdrawal of the rejection.

**c. Claim Rejections - 35 U.S.C. § 103**

Claims 1-19 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Bell et al. (WO 97/38593; 1997) in view of The Merck Index (Monographs 5382, 6788, 9918 and 9932), Zawistowski et al. (WO 01/91587; 2001), Laughlin et al. (US Patent No. 5,470,839; 1995), Stedman's Medical Dictionary (22<sup>nd</sup> Edition, 1973; page 1400), Mendy (US Patent No. 4,407,821; 1983) and DeMichele et al. (US Patent No. 5,780,451; 1998). Applicant respectfully requests reconsideration and withdrawal of the rejection.

The Office asserts that Applicant has not properly considered the references as a whole used together in order to create the obviousness rejection. The office believes that a complete reading of all of the references allegedly provides sufficient basis for the rejection and that an analysis of discrete combinations is inappropriate. Office Action, p. 9.

To establish a *prima facie* case of obviousness, there needs to be (1) some suggestion or motivation to modify the reference or to combine reference teachings, (2) a reasonable expectation of success, and (3) the prior art references, when combined, must teach or suggest all the limitations of the claimed invention. *See* MPEP §2143 (Aug. 2001). “Both the suggestion and the reasonable expectation of success must be founded in the prior art, not in the applicant’s disclosure.” *In re Vaeck*, 947 F.2d 488, 493 (Fed. Cir. 1991). Applicant respectfully asserts that the Office has not met its burden.

Analysis of the entirety of the references used by the Office would not lead a person of ordinary skill in the art to the current invention. Stedman's and Merck are used by the Office to provide information known to one of skill in the art regarding the source and

structure of the different acids or additives used in the invention. Office Action, dated April 27, 2005, pp. 8-15. Laughlin, Mendy, and DiMechelle are used by the Office to provide information regarding the use of vitamins and additives to nutritional products. Id. at pp. 12-14. Zawistowski is used to provide information about the use of certain long chain fatty acids and their equivalents in food nutraceutical compositions. Id. at 11. Finally, Bell is used to disclose compositions with medium and long chain triglycerides from different sources. Id., at pp. 8-15.

Applicant believes Bell does not teach or suggest the specific formulation currently claimed. As the Office has conceded, Bell does not describe the use of linoleic acid, eicosapentaen acid, or docosahexaen acid, elements of the current invention. The Office attempts to remedy this by using Zawistowski.

However, a person of skill in the art would not be motivated to use Zawistowski in order to remedy the deficiency of Bell. Zawistowski describes the use of short and medium chain triglycerides in lieu of long chain triglycerides. The main thrust of the Zawistowski publication is to emphasize that long chain triglycerides should not be used in the context of the nutraceutical compositions described. See, for example, claim 1 of Zawistowski and the Examples. A person of skill in the art reading Zawistowski would not be able to translate the teachings of Zawistowski to Bell as it is unclear if Zawistowski would even accept the inclusion of any long chain triglycerides in the compositions.

Applicant believes that this use of the prior art is not satisfactory for Zawistowski's intended purpose and, therefore, should not serve as part of an obviousness rejection. See MPEP § 2143.01. The fact that references can be combined or modified does not render the resultant combination obvious unless the prior art suggests the desirability of the combination. *In re Mills*, 916 F.2d 680 (Fed.Cir. 1990) and MPEP § 2131.01.

The other references taken in total do not remedy this deficiency. As discussed above, the other patent references relate to vitamins and other additives, while Stedman's and Merck provide information on the source and structure of the fatty acids. Since the references as a whole do not provide a teaching or suggestion of the current invention Applicants respectfully request reconsideration and withdrawal of the current rejection.

**CONCLUSION**

The present application is now in condition for allowance. Favorable reconsideration of the application as amended is respectfully requested.

The Examiner is invited to contact the undersigned by telephone if it is felt that a telephone interview would advance the prosecution of the present application.

The Commissioner is hereby authorized to charge any additional fees which may be required regarding this application under 37 C.F.R. §§ 1.16-1.17, or credit any overpayment, to Deposit Account No. 19-0741. Should no proper payment be enclosed herewith, as by a check being in the wrong amount, unsigned, post-dated, otherwise improper or informal or even entirely missing, the Commissioner is authorized to charge the unpaid amount to Deposit Account No. 19-0741. If any extensions of time are needed for timely acceptance of papers submitted herewith, Applicant hereby petitions for such extension under 37 C.F.R. §1.136 and authorizes payment of any such extensions fees to Deposit Account No. 19-0741.

Respectfully submitted,

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FOLEY & LARDNER LLP

Customer Number:

22428

PATENT TRADEMARK OFFICE

Telephone: (202) 672-5483

Facsimile: (202) 672-5399

By Richard C. Peet

Richard C. Peet  
Attorney for Applicant  
Registration No.: 35,792